

**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1947** 1948

**No. 379** 6

**GRAND RIVER DAM AUTHORITY, A PUBLIC  
CORPORATION,**

*Petitioner,*

*vs.*

**GRAND-HYDRO, A PRIVATE CORPORATION,**

*Respondent*

**PETITION FOR REHEARING OF PETITION FOR  
WRIT OF CERTIORARI AND BRIEF AND ARGU-  
MENT IN SUPPORT THEREOF.**

**QUINCE B. BOYDSTUN,  
DELMAS E. MART  
ROBERT LEANDER DAVIDSON,  
Counsel for Petitioner.**

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GRAND RIVER DAM AUTHORITY, A PUBLIC  
CORPORATION,

*Petitioner,*

*vs.*

GRAND-HYDRO, A PRIVATE CORPORATION,

*Respondent*

PETITION FOR REHEARING OF PETITION FOR  
WRIT OF CERTIORARI

The petitioner, the Grand River Dam Authority, respectfully petitions the Court for a reconsideration and a rehearing of its petition for a writ of certiorari in this cause, and to vacate the order entered herein on the 13th day of December, 1947, denying said petition for writ of certiorari, on the following grounds and for the following reasons:

(1) That since the filing of the petition for a writ of certiorari, the Federal Power Commission, in the Matter of The Niagara Falls Power Company, Project No. 16, rendered an opinion (No. 159, November 17, 1947); rejecting a claim that power values of so-called "water rights" were susceptible to private ownership. This

would apply as well to the respondent's claimed power site values because Congress has exercised similar regulatory control over the waters here involved, as the Commission has heretofore held with judicial approval. (See *Georgia Power Company v. Federal Power Commission*, 152 F. 2d 909, 913-914). The Commission's opinion is therefore at variance with and contrary to the opinion of the Oklahoma Supreme Court in this cause.

(2) The United States has instituted condemnation proceedings to acquire dam-site lands of the petitioner, which lands are located approximately thirty miles downstream from the lands involved in the instant case. Said proceedings are now pending in the United States District Court for the Northern District of Oklahoma (*United States of America, Petitioner v. 1,031.15 acres of land more or less in Mayes County, Oklahoma and Grand River Dam Authority, et al., respondents*, No. 2116-Civil). In this case the United States is seeking to take the petitioner's lands for use in connection with its flood control program, as authorized by Congress. (Acts of June 22, 1936, 49 Stat. 1570; June 28, 1938, 52 Stat. 1215, U.S.C.A. 701 et seq.; August 18, 1941, 55 Stat. 638; July 24, 1946, Public Law 525, 79th Congress, 2d Session; July 31, 1947, Public Law 296, 80th Congress, 1st Session). The United States District Court is confronted with the identical question herein sought to be reviewed, i. e., is the owner or condemnee entitled to compensation for its dam-site lands based upon the value of said lands for the purpose of generating electric power from the waters of a nonnavigable stream over which Congress has jurisdiction? This question has not been passed upon by this Court and is an open question to the United States District Court for the Northern District of Oklahoma, and will remain an open question and be of continuing importance until this Court passes upon the same.

(3) That under the facts in this cause, the local law, as to the measure of compensation in condemnation,



cannot be applied without calling in and construing the Federal law.

(4) That the Oklahoma Supreme Court in effect held the requirements of Section 23(b) of the Federal Power Act and Section 10 of the River and Harbor Act inapplicable to respondent, and in so doing gave those requirements a construction conflicting with those of this and other Federal courts. (See *First Iowa Hydro-Electric Cooperative v. Federal Power Commisison*, 328 U. S. 152, 172, note 17; *Georgia Power Company v. Federal Power Commission*, 152 F. 2d 909, 914 and cases there cited).

(5) That if the judgment of the Oklahoma Supreme Court is permitted to stand uncorrected, the cost of projects located in Oklahoma designed to aid in the control and prevention of floods in downstream states would be inflated by allowances for values which the acts of Congress preserve in trust for the people of the United States, and such additional costs would be a burden on the public and may be so great as to be prohibitive.

Dated this the 28th day of January, 1948

QUINCE B. BOYDSTUN,

*Vinita, Oklahoma;*

DELMAS E. MARTIN,

*Tulsa, Oklahoma;*

ROBERT LEANDER DAVIDSON,

*Tulsa, Oklahoma,*

*Attorneys for Petitioner.*

## BRIEF AND ARGUMENT IN SUPPORT OF PETITION FOR REHEARING

(1) The Federal Power Commission's opinion of November 21, 1947, In the Matter of The Niagara Falls Power Company (a copy of which is set forth as Appendix "A" hereto), issued after the petition herein for certiorari was filed, discloses the real importance and scope of effect of the decision of the Oklahoma Supreme Court if allowed to stand. For that opinion makes clear that the Federal Power Commission in determining actual legitimate original cost of this project, which is licensed under the Federal Power Act, and in determining petitioner's net investment therein for rate making purposes or for compensation in the event of acquisition by the Government at the expiration of the fifty-year license period, will not make any allowance for any inclusion or effect of capitalization of prospective revenues from development of power in expenditures made by the petitioner. (See Sec. 14 of the Federal Power Act.) If the judgment of the Oklahoma Supreme Court stands, petitioner will be required to pay approximately \$767,000.00 which it would not be allowed to include in its "actual legitimate original cost" or "net investment" based thereon.

The petitioner is an instrumentality of the State of Oklahoma, created for the purpose of utilizing the waters of Grand River in Oklahoma, a nonnavigable stream, but a stream over which the United States has control, for power, irrigation, flood control, and other uses. (Okla. Laws 1935, c. 70, as amended, Okla. Stat. 1941, Title 82, Secs. 861-881.) In fact, Congress has assumed jurisdiction over the Grand River including the site involved here. (Acts of June 22, 1936, 49 Stat. 1570; June 28, 1938, 52 Stat. 1215; August 18, 1941, 55 Stat. 638; July 24, 1946, Public Law 525, 79th Congress, 2d Session; July 31, 1947, Public Law 296, 80th Congress, 1st Session), and the United States is proceeding

with construction of the remainder of the comprehensive development consisting of the Markhams Ferry, Pensacola and Fort Gibson dams. As set forth in House Document No. 107, 76th Congress, 1st Session, they are to be "operated as one coordinated unit in the combined interests of flood control and power development."

The Pensacola Dam of this combined flood control and power development was constructed by the petitioner, financed by a Loan and Grant Agreement between the petitioner and the United States. The United States, in the Loan and Grant Agreement, required that no payment or payments should be made to the "Grand-Hydro interests," (respondent) other than for the "cost of lands" required for the Project, and that the payment of the cost of which lands should be approved by the United States before payment was made. This control was retained and extended by the United States in the agreement entered into pursuant to an Act of Congress, approved July 31, 1946, Public Law 573, 79th Congress, 2d Session. The petitioner, on two different occasions, reached an agreement with the respondent, the Grand-Hydro interests, upon the cost of the lands and the amount to be paid, but the United States refused to approve the settlement and authorize the payment of the cost of the lands agreed upon by the petitioner and the respondent. The first settlement agreement was reached by the parties during the year of 1939, the respondent agreeing to accept the sum of \$250,000.00 as just compensation for the lands involved in this proceeding. And again in 1945, after the Supreme Court of Oklahoma had rendered its first opinion and immediately prior to the second trial in the lower court, the respondent agreed to accept the sum of \$281,802.74 as just compensation for these lands, said amount of \$281,802.74 being the amount fixed by the court commissioners, which amount had been paid into court by the petitioner and withdrawn by the respondent. (See affi-

claims set forth as Appendix "B" and Appendix "C".) The petitioner requested the United States to approve this settlement, which was refused, and the petitioner was forced to try this case again in the lower court, the result of which was a verdict of \$800,000.00 in favor of the respondent on which the trial court rendered a judgment against the petitioner for \$518,197.26, said amount being the difference between the verdict of \$800,000.00 and the sum of \$281,802.74, the amount paid into court by the petitioner, with interest at the rate of 6% from the 19th day of January, 1940, the date of taking of the lands by the petitioner. And it was from this judgment that the petitioner appealed to the Supreme Court of Oklahoma and it is the opinion of the Supreme Court rendered on that appeal that is sought to be reviewed here. The deficiency judgment rendered against the petitioner in this cause, together with the interest at this time, amounts to approximately \$767,000.00, all of which resulted because the United States failed and refused to approve and authorize the petitioner to pay the cost of the lands involved herein, as agreed upon between the petitioner and the respondent.

(2) There is a condemnation proceeding now pending in the United States District Court for the Northern District of Oklahoma (*United States of America, Petitioner v. 1,931.15 acres of land more or less in Mayes County, Oklahoma and the Grand River Dam Authority, et al., Respondents, No. 2146-Civil*), in which proceeding the United States is taking by condemnation dam-site lands of the petitioner for a flood control and hydroelectric power project. The petitioner acquired said lands for the purpose of constructing a flood control and hydroelectric power dam thereon to be known as the "Markhams Ferry Dam," which lands are on Grand River approximately thirty miles downstream from the lands involved in the instant case. The petitioner (Authority) has the exclusive right (under state law) to use



said lands and the waters of Grand River for the generation of electric power, and the petitioner (Authority), as an agency of the State of Oklahoma, has a first and prior right to obtain a license from the Federal Power Commission to construct such works under Section 7 of the Federal Power Act (Title 16; U. S. C. 800). The question before the United States District Court for the Northern District of Oklahoma in that case is the same as here presented—"whether a condemnee is entitled to compensation for the loss of power value in lands (in and on a nonnavigable stream over which Congress has jurisdiction under the commerce clause of the Constitution) suitable and adaptable for power use." This question has never been decided by this Court. It was raised in the case of *United States ex rel. T. V. A. v. Powellson*, 319 U. S. 266, 273, but this Court found it unnecessary to pass on the same and the question is still an open one. Unless this Court takes jurisdiction and settles this question, the United States District Court for the Northern District of Oklahoma must decide this question without the aid of any expressed opinion of this Court; and the question, in all probability, will eventually be presented to this Court for final decision. This Court should decide this question in the case at bar in order that the rule of this Court may have application in the pending *Markhams Ferry* case; and for the further reason that if the decision of the Oklahoma Supreme Court is not set aside, the Federal Power Commission's decision in the *Niagara Falls Power Company* case indicates that it would not be bound by the decision of the Oklahoma Supreme Court and would not allow the petitioner to include in its "actual legitimate original cost" or "net investment" the amount (\$767,000.00) paid by the petitioner to the respondent for power value of its lands, and the petitioner would be bound to litigate that question further, both with the Federal Power Commission and with the United States in this case and in the *Markhams Ferry*

case. It is, therefore, important that this Court settle the issue in this case in order to avoid the necessity for such multiplicity of litigation.

(3) The rule for measuring just compensation under the Oklahoma or local law, as announced by the Oklahoma Supreme Court and adhered to in its opinion (R. 91) is as follows:

"The condemnee is ordinarily entitled to compensation measured not only by the value of the land for the use to which he has applied it, but the value thereof for all possible purposes, present and prospective, to which he or his ordinary grantee might *legally* apply the same."

This rule makes it a condition precedent that the condemnee or his ordinary grantee must have the *lawful* and *legal* right to apply and use his lands for the purpose of generating electric power from the waters of Grand River (a stream over which Congress has jurisdiction under the commerce clause of the Constitution) before he is entitled to compensation for the value of his lands for power purposes. This rule warrants no other construction than that the condemnee must have *every* lawful and legal right and can, *in fact*, apply and use his lands for such purposes. Therefore, in order for the Court to apply this rule it must first determine if the condemnee has the lawful and legal right to apply and use his lands for the purpose of generating electric power. The Oklahoma Supreme Court, in deciding whether the respondent had a lawful and legal right to apply and use its lands for the purpose of generating electric power from the waters of Grand River, had to consider and decide two questions:

(a) Did the respondent have a lawful and legal right, under state and local laws, to use its lands for the purpose of generating electric power from the waters of Grand River?

(b) Did the respondent have the lawful and legal right, under Federal law, to use its lands for the purpose of generating electric power from the waters of Grand River?

The Oklahoma Supreme Court decided that the respondent did have the lawful and legal right, under state law, to use its lands for said purposes, but we submit that having the lawful and legal right under state law, and that alone, does not give the respondent the lawful and legal right to apply or use its lands for the purpose of generating electric power from the waters of Grand River; that the respondent, in order to so apply and use its lands, must have the lawful and legal right under the Federal law. Therefore, in order for the Oklahoma Supreme Court to apply its own rule as to the measure of just compensation, it was necessarily faced with deciding if the respondent had the lawful and legal right under Federal law to apply and use its lands for the purpose of generating electric power from the waters of Grand River. The lower court was confronted with the plain, undisputed facts that the Grand River is a stream "over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States," and that the construction of any works therein or thereon is regulated by Federal law (Section 10 of the River and Harbor Act of March 3, 1899, c. 425, 30 Stat. 1121, 1151, 33 U.S.C. 403; Section 23(b) of the Federal Power Act), and that the respondent has not complied and could not comply with the requirements of the Federal law to obtain a lawful and legal right to apply and use its lands for the purpose of generating electric power from the waters of Grand River, under the Federal law. There was no escape for the Oklahoma Supreme Court in deciding this question, other than to call in, consider, and construe the

Federal laws regulating the construction of works on Grand River, and in order for said court to conclude that the respondent did have a lawful and legal right to apply or use its lands for the purpose of generating electric power, that said Federal law did not apply to the respondent, or to construe the Federal law as giving the respondent the right to apply or use its lands for said purposes without complying with the requirements of said Federal laws. In either event, the Oklahoma Supreme Court could not apply its rule as to measure of just compensation to the undisputed facts without applying and construing the Federal law.

(4) The Oklahoma Supreme Court, in applying the Federal law in this case, stated (R. 676):

"Although the Authority had been granted a license by the Federal Power Commission granting it the exclusive right to use the 417 acre tract as a dam site, it could not thereby take private property without just compensation. Nor was the issuance of such license intended to have that effect because the plain provision requires the licensee to pay all damages to the property of others caused by the construction, operation and maintenance of the project. In addition, the Federal Power Commission based its authority to take jurisdiction upon a finding of fact that the construction and operation of the project 'as proposed by the declarant will affect navigable stages of the Arkansas River, a navigable water of the United States, to which said Grand River is tributary.' The Commission would have no authority whatever if the dam site were used for the construction of such a dam that the navigability of the Arkansas River would not be affected."

In this, the Oklahoma court held in effect the requirements of Section 23(b) of the Federal Power Act and Section 10 of the River and Harbor Act inapplicable to the respondent, and in so doing gave those requirements a construction conflicting with the plain provisions of said



acts. In this decision the Oklahoma court held that the Federal Power Commission would have no authority whatever in the event the lands were used for the construction of such a dam that the navigability of the Arkansas River would not be affected, which construction is clearly at variance with that provision of Section 23(b) of the Federal Power Act which is as follows:

" . . . Any . . . corporation . . . intending to construct a dam . . . across, along, over, or in any stream . . . over which Congress has jurisdiction . . . shall before such construction file declaration of such intention with the Commission, whereupon the Commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction, such . . . corporation . . . shall not construct, maintain, or operate such dam or other project works until it shall have applied for and shall have received a license under the provisions of this Act. If the Commission shall not so find, and if no public lands or reservations are affected, permission is hereby granted to construct such dam or other project works in such stream upon compliance with State laws."

Under this provision of the Federal Power Act no dam or works of any kind can be lawfully constructed across, along, or in Grand River without first having a determination by the Federal Power Commission that such dam or works will affect or will not affect the navigable stages of the Arkansas River. The Federal Power Commission has exclusive jurisdiction under this Act to make such determination. The respondent at no time requested the Commission to make such determination and the Commission has made no determination that the respondent's use of its land for the construction of a dam or any other works would not affect the navigable stages of the Arkansas River. In

the event the respondent intended to construct such a dam or works on said land, it would have had no lawful right to do so until the Federal Power Commission determined that such dam or works would not affect the navigable stages of the Arkansas River, and when the Oklahoma Supreme Court said "the Commission would have no authority whatever" in the event the respondent constructed a dam or works that would not affect the navigability of the Arkansas River, it held that the respondent would have a lawful right to construct such dam or works without first having a determination or a finding by the Federal Power Commission that said dam or works would not affect the navigable stages of the Arkansas River.

This construction of the Federal Law by the Oklahoma Supreme Court is in conflict with the decisions of this and other Federal courts. (See *First Iowa Hydro-Electric Cooperative v. Federal Power Commission*, 328 U. S. 152, 172, note 17; *Georgia Power Company v. Federal Power Commission*, 152 F. 2d 909-914, and cases there cited). We submit that when the Federal law in this case is clearly construed and applied to the facts and the local law, that the conclusion of the Oklahoma Supreme Court is an impossibility, for the reason that the respondent has not complied with Section 23(b) of the Federal Power Act which makes "mandatory instead of discretionary, the filing with the Federal Power Commission of a declaration of intention by anyone intending to construct a project in nonnavigable waters over which Congress has jurisdiction under its authority to regulate commerce." (*First Iowa Hydro-Electric Cooperative v. Federal Power Commission*, note 17, *supra*). The respondent is expressly prohibited from using these lands for power development without complying with the provisions of the Federal Power Act, and, therefore, it did not have all of the lawful rights necessary to use its lands for the

purpose of generating electric power from the waters of Grand River.

(5) The Corps of Engineers, United States of America, has recommended that approximately ninety-five reservoir projects be constructed in the State of Oklahoma, at an estimated cost of approximately \$600,000,000. Approximately thirty of these projects have been authorized and approved by the Congress for construction and the Corps of Engineers, in the State of Oklahoma, has constructed or has under construction approximately twenty of these projects, and Congress has authorized for construction in the immediate future, as soon as Congress makes available the necessary funds, approximately ten of said projects. These projects are designed to control the flood waters of the Arkansas River and Red River and their tributaries and to prevent floods in the downstream states. A map showing most of these reservoir projects is hereto attached as Appendix "D." Many of these projects are for flood control, hydroelectric power, soil conservation and recreation. If the judgment of the Oklahoma Supreme Court is permitted to stand uncorrected, the cost of many of these projects will be inflated by allowances for values which the acts of Congress preserve in trust for the people of the United States, and such additional cost will be a burden on the people and may be so great as to be prohibitive, and applied to the development and generation of hydroelectric power from these projects increased rates for such power would be necessary in order for such power project to liquidate its share of the project cost, the effect of which would be to increase the cost of electric power and energy to the public and would tend to restrict and retard the sale of such electric power and energy, not only by the petitioner but by the United States and other public bodies developing and generating hydroelectric power.

**Conclusion**

We respectfully submit that this Court should reconsider the petitioner's application for a writ of certiorari and that a writ of certiorari issue to the Supreme Court of the State of Oklahoma charging said Court to certify and send this Court a full and complete transcript of the record and all proceedings of said Supreme Court of the State of Oklahoma, as prayed for in said petition for a writ of certiorari.

QUINCE B. BOYDSTUN,  
*Vinita, Oklahoma;*

DELMAS E. MARTIN,  
*Tulsa, Oklahoma;*

ROBERT LEANDER DAVIDSON,  
*Tulsa, Oklahoma,*  
*Attorneys for Petitioner.*



## APPENDIX "A"

UNITED STATES OF AMERICA, FEDERAL POWER  
COMMISSION

Opinion No. 159

Project No. 16

In the Matter of THE NIAGARA FALLS POWER COMPANY

By the Commission:

On February 17, 1947, The Niagara Falls Power Company, which operates a hydroelectric power project at Niagara Falls, New York, by virtue of a license issued March 2, 1921, under the Federal Water Power Act, now a part of the Federal Power Act, filed an application, which it supplemented on March 20, 1947, for amendment of paragraph 13 of its license. The license, among other things, authorizes the Company to divert daily for a period of 50 years 19,725 cubic feet per second (c.f.s.) from the Niagara River for Power purposes.<sup>1</sup>

In accordance with the Act, the license provides for possible acquisition of project property by the United States at the end of the license period. In this connection, paragraph 13 of the license states in part:

Such taking over of the project shall also be subject *to the rights, if any, of Pettebone-Cataract Paper Company and Cataract City Milling Company to withdraw water at a rate not exceeding 265 cubic feet per second from the Hydraulic Canal or Basin of Licensee, and to the rights, if any, of International Paper Company. (Italics supplied.)*

The 265 cubic feet per second referred to in paragraph 13 are a part of the 19,725 c.f.s. which The Niagara Falls

<sup>1</sup> The original license authorized a diversion of 19,500 c.f.s., a subsequent amendment bringing the diversion to 19,725. Other amendments to the license authorize emergency diversions of 12,500 c.f.s. and a temporary authorization permits an additional diversion of 275 c.f.s., but these have no bearing on the instant proceeding.

Power Company is authorized to divert from the Niagara River. The licensee seeks to eliminate from paragraph 13 of the license the language in italics above. In explanation of the application, the licensee on March 20, 1947, filed an amendment in which it stated:

It is the purpose of our requested amendment of license for project No. 16, and we hereby so apply, to have the license amendment include in the project the so-called Pettebone-Cataract water rights which are to be acquired from Buffalo Niagara Electric Corporation.

Hence, approval by the Commission of the proposed change would be construed as an implied approval of the claim that the so-called water rights are in existence, are valuable, and can be purchased.

In other words, while the form of the petition relates only to amendment of the license by striking out one of the provisions thereof, the substance of the petition relates to contemplated acquisition of so-called water rights which are claimed to be very valuable. Accordingly, we shall direct our attention to the substance rather than to the form of the petition.

The alleged water rights purport to convey the right to take and withdraw from the Hydraulic Basin of the licensee and to use 262.6 cubic feet per second of water through a head not exceeding 100 feet. They were said to have originally attached under State law to certain parcels of land owned by Pettebone-Cataract Paper Company and Cataract City Milling Company. Both the lands and other properties and the alleged water rights were purchased in 1925 by Niagara, Lockport and Ontario Power Company, an affiliate of licensee. The day after the purchase, Niagara, Lockport and Ontario, by an agreement dated May 1, 1925, sold the land and other physical property to the licensee but expressly reserved to itself title to the water rights in question. Buffalo Niagara Electric Corporation is the successor to Niagara, Lockport and Ontario, and is also an affiliate of Niagara Falls Power Company. The Niagara Falls Power Company, licensee, proposes to acquire the alleged water rights from Buffalo Niagara Electric Corpo-

ration for a cash consideration of \$728,415.45, which is said to be the cost incurred by Niagara, Lockport and Ontario. Buffalo Niagara holds no authority from the United States for the diversion or use of any water at Niagara Falls.

Niagara River is a navigable water of the United States and an international boundary stream. In our opinion Buffalo Niagara Electric Corporation does not possess any lawful title to the water rights in question for the reason that there cannot be private ownership of the waters of a navigable river of the United States. *United States v. Chandler-Dunbar Co.*, 229 U. S. 53, 66. It is useless to contend that the water can be subject to private ownership after diversion, but before use by The Niagara Falls Power Company for power purposes, because the water under the license can be diverted only for power purposes of the licensee and for no other purpose. The licensee already has the right, under the license, to use the 262.6 c.f.s. which is the subject of its petition, and it is futile for it to attempt to purchase that which it already possesses to the fullest extent of the law.

As previously noted, it is contended that the purported water rights are founded on State law which, in this instance, is said to be superior to federal authority over the stream. Not only is this contention at variance with the recognition in the *Chandler-Dunbar* case, *supra*, of the limitations of State rights, but it is at variance with similar holdings in cases dealing with the Federal Power Act.

The license issued for Project No. 16 on March 2, 1921, purported, under the provisions of Section 23 of the Act, to allow the licensee the fair value of its property as of that date upon the assumption that the company then held some continuing right to the diversion and use of water from the Niagara River. If it did not have such a right it was entitled only to a license providing that the net investment should be based upon the actual legitimate original cost of the project. In 1942 after extended review of the contentions, the Commission held the company was not entitled to a fair value license, because, it said, the licensee in 1921 actually had no valid outstanding federal authority to divert water from the Niagara River and its State rights were not sufficient. In sustaining the Commission's disallowances

of fair value the United States Court of Appeals for the Second Circuit on July 29, 1943, referred to the allotment of water permitted under the treaty of 1910 and said:

When Congress set up the Commission with power to issue licenses for the "utilization of power . . . from . . . any of the navigable waters of the United States" (Sec. 4(d) of the Act of June 10, 1920) the Commission was vested with the distribution of this allotment and any rights acquired from the State of New York necessarily yielded to what it might do.

(*Niagara Falls Power Company v. Federal Power Commission*, 137 F. 2d 787, 791; cert. denied by United States Supreme Court, 320 U. S. 792; rehearing denied, 320 U. S. 815.)

Again, the Supreme Court said that where the Federal Government supersedes the State government, there is no suggestion in the Federal Power Act that the two agencies both shall have final authority. In fact, the Court said several sections of the Act indicate a contrary policy. First *Iowa Hydro-Electric Cooperative v. Federal Power Commission*, 328 U. S. 152, 168.

Some point was made by the licensee that the alleged water rights attached to the water after it is diverted from the Niagara River, over which the United States admittedly has control, and after it is conveyed to the Hydraulic Basin of the project where it becomes subject to private ownership under State law. This is to suggest that while the United States may control the actual diversion of water from the Niagara River, it has no authority to control the use of the water so diverted because after diversion under federal authority the water becomes subject to State or private control even if used contrary to the federal authorization.

This argument disregards the nature of the permission given by the United States to make any diversion of this navigable stream. Under the terms of the license the licensee is authorized to divert and use water from the Niagara River for power purposes solely through Project No. 16 where a head of approximately 210 feet is provided, or twice



the head formerly utilized by the paper and milling companies. The licensee is not authorized to divert water to sell to any other user or power developer or to supply from its diversion canal water claimed under any so-called State right. We do not regard the authority of the United States as being limited in the manner suggested by the licensee, nor do we recognize that the licensee would comply with the terms of the license if it did not use all of the diverted water through the facilities authorized as composing Project No. 16.

It follows that the above-quoted provisions of paragraph 13 of the license are of no legal significance or effect because the diversion and use of the water authorized by the license can be subject to no superior private rights and the license should not be amended to include the alleged rights as requested. Accordingly, while we would be agreeable to the elimination of the language requested merely as a means of clearing up the license instrument, we cannot consent to the elimination of a part of paragraph 13 leaving an amended paragraph which might be construed as recognizing other alleged water rights claimed by another company.

Upon the record before us, we are of the opinion that the application for license amendment should be denied. An order will be entered.

NELSON LEE SMITH,

*Chairman.*

CLAUDE L. DRAPER,

*Commissioner.*

LELAND OLDS,

*Commissioner.*

HARRINGTON WIMBERLY,

*Commissioner.*

Dated at Washington, D. C., this 17th day of November, 1947. Leon M. Fuquay, Secretary.

# UNITED STATES OF AMERICA; FEDERAL POWER COMMISSION .

Before Commissioners: Nelson Lee Smith, Chairman;  
Claude L. Draper, Leland Olds and Harrington Wimberly

November 17, 1947.

Project No. 16

In the Matter of THE NIAGARA FALLS POWER COMPANY

## ORDER DENYING APPLICATION FOR AMENDMENT OF LICENSE

(1) Upon application filed February 17, 1947, as supplemented March 20, 1947, by The Niagara Falls Power Company, licensee for Project No. 16 for amendment of the license issued March 2, 1921, under the statute now known as the Federal Power Act, for elimination from Paragraph 13 of the license of a reference to certain water rights then claimed to be held by Pettebone-Cataract Paper Company and Cataract City Milling Company;

(2) Upon the facts found and for the reasons set forth in Opinion No. 159, which is hereby incorporated by reference and made a part hereof, it is *ordered* that:

(3) The application for amendment of Paragraph 13 of the license for Project No. 16 referred to above is hereby denied.

By the Commission.

Leon M. Fuquay; Secretary.

Date of Issuance: November 21, 1947.

## APPENDIX "B"

## AFFIDAVIT

STATE OF OKLAHOMA,

County of Craig, ss:

Fred M. Hartley, being first duly sworn upon oath, deposes and states:

That he is a resident of the State of Oklahoma and is a duly appointed, acting and qualified member of the Board of Directors of the Grand River Dam Authority, having been appointed as such member on the 7th day of June, 1943; that he has been a member of the Board at all times hereinafter mentioned and has served, since the 3rd day of June, 1945, and is now serving, as Chairman of the Board.

That under direction of the Board of Directors of the Grand River Dam Authority, he interviewed Mr. Ben Lyons, President of Grand-Hydro, a corporation, several times alone, and several times with Mr. James R. Ray, Vice Chairman of the Board of Directors, in an attempt to arrive at a settlement of the Grand-Hydro lawsuit; that at first Mr. Lyons insisted on being paid an amount of money over and above the amounts already paid into court in the condemnation proceedings; that finally, on the 2nd day of April, 1945, he got Mr. Lyons to agree that he would settle the case for the amount already paid into court, which was approximately \$281,802.74 in the Mayes County case, and approximately \$32,972.39 in the Delaware County case, totalling \$314,775.13.

That he reported this at the Board meeting the morning of April 2, 1945, and, after discussion, the Board suggested that Mr. Holway, Consulting Engineer for the Authority, and he, see Mr. Lyons at the Mayo Hotel and confirm this offer to settle; that he and Mr. Holway met Mr. Lyons at noon and Mr. Lyons confirmed the offer to settle; that he reported to the Board when they reconvened and the Board voted to accept Mr. Lyons' offer, subject to approval of the United States Government, and instructed General Counsel Edward P. Marshall to write a letter to Mr. Douglas G. Wright, Administrator of the Southwestern Power Admin-

istration, requesting concurrence by the United States in the proposed compromise of the litigation; that after the meeting adjourned, Mr. Ray and he and Mr. Hugh M. Marsh went to interview Mr. Wright relative to this agreement; that Mr. Wright then called in Mr. R. L. Davidson, General Counsel of the Southwestern Power Administration and Mr. Wright assured them that he would send this matter to the Secretary of the Interior for immediate approval or disapproval; and that he, Mr. Wright, felt sure that he would recommend the settlement to the Secretary; that on the same evening, or the next morning, he went again to Mr. Wright's office and took Mr. Lyons with him to urge Mr. Wright's immediate approval of the settlement.

That, on the 3rd day of April, 1945, Mr. Marshall wrote a letter requesting concurrence by the United States in the proposed compromise, and received a reply on April 6, 1945, signed by Mr. Wright, stating that the Secretary of the Interior had advised he would not approve the proposed settlement, but authorizing the Authority to offer \$250,000.00 in settlement, which offer of the Government was \$64,775.13 less than the amounts paid into court and drawn down by Grand-Hydro, and Grand-Hydro refused to accept the counter-proposal of the Government.

FRED M. HARTLEY.

Subscribed and sworn to before me this 23rd day of December, 1947.

[SEAL]

JEWELL GUTHRIE,  
Notary Public.

My commission expires April 3, 1950.





**APPENDIX "C"**

STATE OF OKLAHOMA,  
County of Craig, ss:

W. R. Holway, of lawful age, being first duly sworn upon oath, states:

That he is a resident of Tulsa, Oklahoma and an Engineer by profession, maintaining engineering offices at Tulsa and Vinita, Oklahoma; that he is and has been retained as Consulting Engineer on the Grand River Dam Project since October 22, 1937, both by the Grand River Dam Authority and by the Federal Government during the period of Federal control of said project.

That at a meeting of the Board of Directors of the Grand River Dam Authority held in the Kennedy Building, Tulsa, Oklahoma, the question of a settlement of the Grand-Hydro lawsuit was brought to the attention of the Board. Mr. Fred M. Hartley, Chairman of the Board, and Mr. James Ray, Vice-Chairman of the Board, reported that Mr. Ben Lyons, President of Grand-Hydro had offered to settle for the amount of money which had been paid into court in Delaware County and Mayes County, Oklahoma. They stated that Mr. Lyons was at the Mayo Hotel. The Board of Directors requested Mr. Hartley and myself to see Mr. Lyons during the noon recess and confirm the fact that Mr. Lyons was ready to settle.

Mr. Hartley and I met Mr. Lyons in the lobby of the Mayo Hotel and Mr. Lyons told us that he was ready to settle the case for the amount already paid into court in the condemnation proceedings, which amount was approximately \$281,802.74 in Mayes County, and approximately \$32,972.39 in Delaware County. When the Board reconvened in the afternoon, they voted to accept Mr. Lyons proposal, as shown in the minutes of their meeting of April 2, 1945, and they authorized Mr. Edward P. Marshall, General Counsel, to write a letter to Mr. Douglas G. Wright, Administrator of the Southwestern Power Administration, requesting his concurrence in the settlement. This concurrence was necessary for two reasons: (1) the original Loan and Grant

Agreement provided for the approval of the Administrator before any monies could be paid to Grand-Hydro; and (2) the Southwestern Power Administration had possession of the Project and all Project funds.

W. R. HOLWAY.

Subscribed and sworn to before me this the 23 day of December, 1947.

[SEAL]

JEWELL GUTHRIE,  
*Notary Public.*

My commission expires April 3, 1950.

(Here follows 1 photo., Appendix D)



